

## Legal Briefing

### The impact of an arbitration clause upon a Part 8 application

*Maelor Foods Ltd v Rawlings Consulting (UK) Ltd [2018]*

*EWHC 1878 (QB)*

Before His Honour Judge Eyre QC

High Court of Justice Business and Property Courts in Manchester Technology and Construction Court

Judgement delivered 6 July 2018

#### The facts

Under a contract dated August 2016 Maelor engaged Rawlings to carry out works at a processing plant in Wrexham. The contract was based upon the 2011 JCT standard form.

Article 7 in the contract provided for adjudication. Article 8 provided that any dispute or difference of any kind, except for disputes or differences in connection with the enforcement of a decision of an adjudicator, was to be referred to arbitration.

Following a dispute over the validity of an interim payment notice dated 17 April 2018, Rawlings commenced adjudication. Maelor challenged the adjudicator's jurisdiction on grounds that the interim payment notice included sums payable in connection with other exchanges between the parties occurring before and after August 2016 that did not form part of the contract. Maelor also contended that the interim payment notice was invalid having been preceded by an interim payment application that Rawlings acknowledged was non-compliant with the contract.

Having found that the sums in the interim payment notice were claimed under the contract or as variations to the contract and that the interim payment notice was valid, the adjudicator concluded that he did have jurisdiction. On 21 June 2018 he awarded Rawlings the £720,300 claimed in the interim payment notice.

On 26 June 2018 Maelor issued a Part 8 application seeking declarations that the interim payment notice was invalid, that the adjudicator's decision to the contrary was wrong in law and that no sums were due to Rawlings pursuant to the interim payment notice. On 2 July 2018 Rawlings applied for

a stay under section 9 of the Arbitration Act 1996 on the grounds that the matters raised in the Part 8 application were questions that had to be resolved through arbitration rather than through court proceedings. Maelor contended that its Part 8 application was permitted by the exception in the arbitration clause.

#### The issue

Did Maelor's Part 8 application amount to a dispute or difference in connection with the enforcement of an adjudication decision?

#### The judgment

The judge rejected Maelor's primary submission that the dispute raised by the Part 8 application fell within the exception in the arbitration clause. The judge noted that the parties had specifically limited the exception to matters of enforcement and effect had to be given to these words. Where the 'pay now, argue later' approach applied to the implementation of adjudicators' decisions the judge said he could see ample sense in parties agreeing to exclude from arbitration enforcement proceedings and arguments directly related to enforcement.

Where the Part 8 application sought the determination of issues of law that had been raised in the adjudication, the judge characterised the application as a challenge to the correctness of the adjudicator's decision and as such, it was not a dispute or difference directly in connection with the enforcement of that decision. The judge acknowledged that if Maelor's Part 8 "pre-emptive strike" was successful it would undermine any enforcement obtained by Rawlings but this did not in itself make the application a dispute or difference in connection with the enforcement of an adjudication decision.

Maelor's second point was that where the sums claimed in the interim payment notice arose under different contracts, not all of those contracts included an arbitration clause making a stay inappropriate. However, the judge noted that the adjudicator's decision was made under the August 2016 contract. The adjudicator had decided that the interim payment notice was issued pursuant to that single contract and therefore the dispute raised by the Part 8 application was a dispute about the actions taken under that single contract which included an arbitration clause.

The judge therefore stayed Maelor's Part 8 application to arbitration.

## Legal Briefing

### Commentary

Maelor and Rawlings agreed that there was no direct authority upon the wording used in the exception to the arbitration clause. The judge accepted Rawlings' argument that a distinction must be drawn between matters which challenged the enforceability of the decision *per se*, for example, breaches of natural justice, and those cases in which the challenge is in effect a challenge to the correctness of the decision.

Here, Maelor was seeking to thwart the adjudicator's decision by challenging the adjudicator's principal substantive findings so on a proper interpretation of article 8 in the contract this was not a dispute or difference directly connected with enforcement.

This judgment amounts to a further discouragement to parties who seek to challenge an adjudicator's substantive conclusions via the unreliable shortcut of a Part 8 application.

Ted Lowery  
September 2018